IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAM MELNICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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MISC. 2431

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JURISDICTION AND STATEMENT OF THE CASE

Appellant SAM MELNICK was indicted together with co-defendant ALFRED H. OSBORNE, SR., by a Federal Grand Jury for the Southern District of California, Central Division on November 27, 1963, in a twenty-count indictment charging violation of Title 18 U.S.C. §2314 (Counts 1-18); Title 18 U.S.C. §2 (Count 19) and Title 18 U.S.C. §371 (Count 20) [C. T. 2].

A jury trial of both defendants began on May 18, 1965, and on May 26, 1965, appellant withdrew his plea of not guilty to Count 20 of the indictment and pleaded guilty [R. T. 702]. On June 28, 1965, appellant was sentenced to three years imprisonment [R. T. 1147].

On August 2, 1965, a motion to withdraw the plea of guilty

to Count 20 was made by appellant and denied by the Court [R. T. 1157].

On August 4, 1965, a timely notice of appeal was filed from the order denying the motion to withdraw the plea of guilty [C. T. 277].

Jurisdiction of the District Court rested on Title 18 U. S. C. §3231 and §371. This Court has jurisdiction under Title 28 U. S. C. §1291 and §1294.

STATUTE INVOLVED

The appeal in this matter is based upon Title 18 U. S. C. §371 and Federal Rules of Criminal Procedure, Rule 32(d) which provide in pertinent part as follows:

Section 371:

> "If two or more persons conspire either to commit any offense against the United States, or to defend the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Rule 32(d):

> "A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence

is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

STATEMENT OF THE FACTS

The factual details of the offenses set forth in appellant's brief, bear no relevance to the issue herein, as this appeal is purely and simply directed to the order denying the motion to withdraw the plea of guilty to Count 20 of the indictment. As to that event, the facts are as follows:

After seven days of trial, during which time appellant SAM MELNICK and his attorney actively participated in the defense against the government's charges, appellant voluntarily, upon and with advice of his counsel, withdrew his plea of not guilty to Count 20 and entered a plea of guilty to Count 20 [R. T. 702]. On June 28, 1965, appellant was sentenced to a prison term of three years [R. T. 1148] and the government moved for dismissal of the remaining nineteen counts against him.

On August 2, 1965, appellant moved to set aside his plea of guilty to Count 20 and re-enter his earlier plea of not guilty. The motion was denied [R. T. Vol. 10]. On August 3, 1965, a notice of appeal was filed [C. T. 277] that purported to appeal from the original judgment and the order denying the motion to withdraw the

guilty plea. [1]

On August 4, 1965, a second notice of appeal [2] was filed.

PREFATORY REMARK

The sole issue before this Court is the propriety of the order denying the request to withdraw the plea of guilty to Count 20. The jurisdictional statement contained on page 1 of appellant's brief erroneously extends the scope of this appeal to include an attack upon the judgment of conviction and interim trial rulings. Suffice it to say that such is not the case [footnote 1 and 2 infra]. Accordingly appellee will direct its comments to the sole issue before this tribunal.

SUMMARY OF ARGUMENT

A. The contentions advanced by the appellant are wholly without merit in law or fact.

B. The action of the district court in denying the motion to withdraw the plea of guilty is discretionary and

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1/ After the receipt of said notice of appeal from the appellant the government moved this Court for an order dismissing this appeal on the grounds that it was untimely. This motion was granted by a series of orders of this Court dated October 15, 1965 and November 2, 1965.

2/ Appealing only from the order denying the motion to withdraw the plea of guilty, which is the current appeal now before this Court.

defendant entered his plea without advice of counsel and in Kadwell the defendant was far from home, had neither funds nor family and was not advised of the consequences of a guilty plea and in fact was not even aware of the nature of the charge against him. In this case appellant, in addition to verbal inquiry by the court, signed a statement (C. T. 281) showing knowledge, consent, etc.

2. Appellant Was Not Coerced Into Entering His Plea of Guilty.

Appellee approaches this assertion by appellant with a feeling akin to "awe". A careful reading of this particular argument suggests that the coercion, if any, occurred as follows:

(A) Appellant Melnick was threatened with violence by codefendant Osborne if Melnick pleaded guilty.

(B) Appellant Melnick pleaded guilty.

(C) Appellant Melnick was coerced into pleading guilty by codefendant Osborne.

Appellee submits that this argument apropos coercion is on its face inconsistent.

3. Appellant Melnick Was Not Mislead Into Pleading Guilty.

Conceding for the purpose of argument only, that appellant's argument (appellant's brief p. 18), properly sets forth the

inducement leading to the plea of guilty, it is respectfully submitted that even such facts do not form a basis for reversal.

The cases cited by appellant (p. 19 of appellant's brief), actually hold contrary to appellant's stated position. In fact, Jares v. United States, 279 F. 2d 652 (9 Cir. 1960) is an appeal from a ruling by Judge Wm. M. Byrne denying a motion to withdraw a plea of guilty, which order was sustained by this court, as a proper exercise of discretion.

4. No Manifest Injustice Resulted From the Denial of the Motion to Withdraw the Plea of Guilty.

Pilkington v. United States, 315 F. 2d 204 (4 Cir. 1963), cited by appellant in support of this contention is distinguishable on its facts from the instant appeal. In Pilkington, a sentence permitted by statute (18 U. S. C. §5005, et seq.), was imposed without prior explanation by the Pilkington court to the defendant. In the instant matter the sentence [R. T. 702-704], was clearly and concisely explained.

As to the generalizations contained in appellant's arguments, Futterman v. United States, 202 F. 2d 185 (D. C. Cir. 1952), and Schneer v. United States, 194 F. 2d 598 at 600 (3 Cir. 1952), cases cited by appellant actually buttress the Government's position herein to the effect that manifest injustice must be clear and cogent and be supported in turn by evidence submitted by the defendant. As the defendant has the burden of proof in establishing manifest injustice

as grounds for reversal.

B. THE ACTION OF THE DISTRICT COURT IN DENYING THE MOTION TO WITHDRAW THE PLEA OF GUILTY IS DISCRETIONARY AND NOT SUBJECT TO REVERSAL IN THE ABSENCE OF AN ABUSE OF DISCRETION.

As stated by the court in Criser v. United States, 319 F.2d 849, 850 (10 Cir. 1963), "A defendant who enters a plea of guilty has no legal way to withdraw it and an application for leave to withdraw such plea is addressed to the sound discretion of the trial court". In the instant situation not a scintilla of evidence has been adduced to show or even infer that the lower court did not properly exercise its discretion. Rather rhetoric, in the form of the argument headings by appellant which purport to pose theoretical questions rather than legal contentions, is employed by appellant to raise a wholly irrelevant doubt as to the motive of the appellant in pleading guilty.

Zaffarand v. United States, 330 F.2d 114 (9 Cir. 1964);

Goo v. United States, 187 F.2d 62 (9 Cir. 1951), cert. den. 341 U.S. 916.

A close scrutiny of the entire record relating to the present issue reveals neither serious nor even casual assertion that the appellant in any way relies upon a claim of innocence as part of his reasons for requesting the withdrawal of his plea of guilty. Though

such an assertion is not mandatory in considering such a motion, it should be advanced in some degree.

As was stated in the case of United States v. Norstand Corp., 168 F. 2d 481 (2 Cir. 1948):

> "When a defendant who has pleaded guilty makes application to withdraw his plea, he should at the very least allege that he was not guilty of the charge to which he pleaded."

To like effect, please see Everett v. United States, 336 F. 2d 979 (D. C. Cir. 1964).

Finally, surprise as to the severity of sentence does not constitute the manifest injustice which must appear before the Court, after sentence, to set aside the judgment of conviction and permit a defendant to withdraw his plea. Further, surprise which results from even erroneous information from defense counsel does not constitute manifest injustice without a clear showing of unprofessional conduct.

Pinedo v. United States ___ F. 2d ___
(9 Cir. 6-18-65).

As was stated by the Court in Smith v. United States, 324 F. 2d 436, 440 (D. C. Cir. 1963), cert. den. 376 U. S. 957:

> "The rule is that manifest injustice does not result from a plea of guilty following erroneous advice of counsel as to the penalty which could be imposed."

To like effect please see:

Everett v. United States, supra;

Verdon v. United States, 296 F.2d 549 (8 Cir. 1961)

Georges v. United States, 262 F.2d 426

(5 Cir. 1959);

United States v. Sheer, 194 F.2d 598 (3 Cir. 1952).

In this case the trial court properly exercised its discretion.

CONCLUSION

For the reasons above submitted, it is respectfully requested that the appeal be denied and the order below affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Jules D. Barnett

JULES D. BARNETT